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Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of The United States

October Term, 2000

CO-STEEL RARITAN

Petitioner,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party's economic benefit under a contract may be wholly or virtually destroyed by state regulation consistently with the impairment of Contracts Clause?

2. Whether a single consumer of electricity can be arbitrarily excluded from a statutorily mandated guaranteed rate reduction for "all customer classes" consistently with the requirements of Equal Protection?

3. Whether a state regulatory agency consistently with the requirements of Due Process may base adjudication on extra-record sources, without prior notice to the parties of such an intent, without affording the right to cross-examine or make meaningful comment on such extra-record sources, and without providing a meaningful rationale for its actions?

LIST OF PARTIES

The following parties participated in the appeals of the Final Decision and Order of the New Jersey Board of Public Utilities:

Co-Steel Raritan
Division of the Ratepayer Advocate, State of New Jersey
Enron Energy Services
Independent Energy Producers of New Jersey
Jersey Central Power & Light Company
New Jersey Board of Public Utilities
New Jersey Business Users
New Jersey Commercial Users
Public Service Electric & Gas Company
Rockland Electric Company
Tosco Refinery Company

The following additional parties participated in the administrative proceeding before the New Jersey Board of Public Utilities

Allen Goldberg Atlantic City Electric Company
Citizens Against Rate Escalation
Coalition for Fair Competition
Cogen Technologies Energy Group
County of Passaic, New Jersey
Duke Energy Trading and Marketing, L.L.C.
Electric Clearinghouse, Inc.
International Brotherhood of Electrical Workers, Local 94
Mid-Atlantic Power Supply Association
National Resources Defense Council
New Jersey Industrial Consumer Group
New Jersey Public Interest Intervenors
New Jersey Transit Corporation

RULE 29.6 LISTING

Co-Steel Raritan is a wholly owned subsidiary of Co-Steel, Inc. As far as management is aware, no publicly held company owns ten percent or more of the stock of Co-Steel, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Co-Steel Raritan, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The Order of the Supreme Court of New Jersey (App., *infra*, 1a), is not reported. The opinion of the Superior Court of New Jersey Appellate Division (App., *infra*, 14a) is reported at 330 N.J.Super. 65, 748 A.2d 1161 (2000).

JURISDICTION

The New Jersey Supreme Court entered its Order on December 6, 2000. (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, of the Constitution of the United States provides, in relevant part, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall . . . deprive any person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT

On July 15, 1997, Co-Steel's electric utility, Public Service Electric & Gas Company ('PSE&G'), filed an application with the New Jersey Board of Public Utilities ('BPU') requesting authority to unbundle its rates,[1] restructure its operations, determine the amount of recoverable stranded costs,[2] and set the level of related stranded cost charges[3] in anticipation that New Jersey's electric markets would soon be opened to competition.[4] The BPU reserved for itself issues

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[1] In the regulatory regime that existed in the United States throughout the last century, electric utilities provided integrated "bundled" services (*e.g.*, generation, transmission, distribution, meter reading, billing, etc.) for which they charged a single, "bundled" rate.

[2] "Stranded cost" is a term used to describe utility investments made in a regulated environment that the utility claims have been rendered uneconomic through deregulation of the electric industry. App., *infra*, 378a.

[3] *I.e.*, charges designed to recover a utility's stranded costs.

[4] On June 8, 1999, PSE&G initiated a separate proceeding (BPU Docket No. EF99060390) to request authority, pursuant to the Deregulation Act, to recover and securitize its bondable stranded costs and impose a transition bond charge on its customers. On July 9, 1999, Co-Steel filed a motion to intervene in Docket No. EF99060390. On September 17, 1999, the BPU issued an order

regarding restructuring and held hearings on that issue between April 27 and May 28, 1998. The BPU assigned an administrative law judge to conduct an adjudicative hearing on disputed issues of material fact in the unbundling and stranded cost filing. In the course of that hearing, conducted between February 9 and May 28, 1998, numerous parties, including the New Jersey Ratepayer Advocate,[5] submitted evidence addressing the broader issues presented by the application, including the existence and amount of PSE&G's stranded costs and stranded cost charges. Co-Steel introduced testimony and documentary evidence to support its position that the imposition of stranded cost charges on Co-Steel would violate a 1995 contract between Co-Steel and PSE&G ('Contract')[6] and, if authorized by the BPU, would unconstitutionally impair the obligations of that Contract.[7]

The Contract had previously been approved by both the state attorney general acting on behalf of the State of New Jersey and the BPU.[8] Under that Contract, Co-Steel continued to receive the same kind of interruptible, non-firm electric

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denying Co-Steel's motion to intervene. The appeals of the BPU's decisions in this docket were consolidated in the superior court.

[5] The office of Ratepayer Advocate operates as a division of the BPU, charged with the responsibility "to represent, protect, and advance the interests of all consumers of utility services, including residential, small business, commercial, and industrial ratepayers, in an effort to protect and promote the economic interests of all New Jersey ratepayers." N.J.S.A. 13:1D-1, at 29.

[6] The text of the Contract appears in the Appendix, *infra*, 414a. In addition to the discussion here, its provisions are described in greater detail, *infra*, 7-9.

[7] App. *infra*, 374a -396a and 397a-446a.

[8] *In the Matter of the Petition of Public Service Electric & Gas Company for Approval of an Experimental Hourly Energy Pricing Tariff*, Docket No. ER9501005, 165 P.U.R.4th 444, Order of November 17, 1995.

service as it had since 1980.[9] The Contract provides, however, that Co-Steel's rates and charges would be governed by a unique, dual tariff structure, that reduced Co-Steel's electric costs by approximately twenty-five percent (a savings of $6 million per year).[10] In exchange for this reduced rate, Co-Steel agreed to 1) abandon its plans to move its operations to another state; 2) invest at least $37 million in new capital at its New Jersey plant; and 3) remain a retail customer of PSE&G for the ten-year term of the Contract, thus waiving for that period its ability to obtain electric service from an alternative electricity provider in the event of deregulation.[11]

The ALJ issued his Initial Decision on August 17, 1998. Although extensive, that decision did not address the constitutional issue raised by Co-Steel, thereby implicitly holding Co-Steel subject to stranded cost charges.[12] The Initial Decision also failed to quantify either the value of PSE&G's assets or its stranded costs.[13] Co-Steel and others filed exceptions with the BPU in October, 1998.[14]

While those exceptions were pending, a number of events occurred. Principal among these was the enactment, on February 9, 1999, of New Jersey's Electric Deregulation and Energy Competition Act ('Deregulation Act' or 'Act').[15]

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[9] "Non-firm" electric service can be interrupted at the discretion of the utility under such terms and conditions as contained in the applicable interruptible service tariff and/or contract. Because the utility is not unconditionally obligated to serve interruptible load it need not dedicate a corresponding amount of generation or transmission assets to serve it. *See* App., *infra*, 391a.

[10] App., *infra*, 32a-33a, 383a-384a.

[11] App., *infra* 32a, 408a-409a.

[12] App., *infra* 203a.

[13] App., *infra* 26a.

[14] App., *infra* 26a.

[15] N.J.S.A. 48:3-49, *et seq.*

Among other things, the Act directed that retail competition be implemented by August 1, 1999, provided a general framework for the establishment of and transition to a competitive electric industry, established specific requirements for the determination of the market value of utility assets and other issues, including recovery of stranded costs, authorized the issuance of bonds to 'securitize' utilities' stranded costs,[16] authorized utilities to transfer their generation assets to affiliates, and directed that "each customer class" of "each public utility" receive a 5% rate reduction by August 1, 1999, and at least a 10% rate reduction by August 1, 2002, "relative to the aggregate level of bundled rates in effect as of April 30, 1997 . . . ."[17]

On March 8, 1999, several parties sought, unsuccessfully, to re-open the record to permit the introduction of new evidence in light of the requirements of the Deregulation Act.[18] On March 17, 1999, several parties submitted a non-unanimous settlement agreement[19] in which PSE&G revealed for the first time that it intended to revise its restructuring plan and immediately transfer its generating assets to an unregulated affiliate.[20]

In a Summary Order issued on April 21, 1999, the BPU essentially accepted the revised plan of operation included in the non-unanimous settlement agreement as the basis for its

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[16] Through securitization, the utility issues and receives in a lump sum the proceeds from bonds and the debt service is paid by the ratepayers thereby greatly accelerating what would otherwise have been its revenue stream from these assets under the previous regulatory regime.

[17] N.J.S.A. 48:3-52(4)(d). *See* App., *infra*, 27a

[18] *See* App., *infra*, 365a, *et seq.*

[19] App, *infra*, 28a

[20] Its filed plan provided for these assets to be retained for at least seven years.

subsequent decisions.[21] The BPU issued its Final Decision and Order ('Final Order') on August 24, 1999.[22] Among other things, the Final Order fixed the value of PSE&G's assets and the amount of its stranded costs based upon the report of a BPU-employed consultant, which had never been introduced as evidence in any of the hearings.[23] With regard to the issues raised by Co-Steel, the BPU found that "there is no legal basis in the Act for an exclusion for Co-Steel from paying "Stranded Costs." It also noted that "the price [of Block 2 usage] will be unaffected by this Order,"[24] thereby precluding Co-Steel from receiving the statutory rate reductions on two-thirds of its energy purchases.

As explained in greater detail below,[25] Co-Steel and several other parties pursued timely motions for rehearing and subsequent appeals. Co-Steel argued therein that the BPU's decision regarding stranded costs violated and unconstitutionally impaired its Contract and, in the alternative, that its decision regarding the statutory decrease in rates violated the Deregulation Act and principles of equal protection.[26] Other parties challenged the BPU decision on

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[21] App., *infra*, 356a.

[22] App., *infra*, 165a.

[23] App., *infra*, 26a, 316a

[24] App., *infra*, 335a. Consistent with the Board's August 24, 1999 ruling, the September 17, 1999 Bondable Stranded Costs Rate Order authorized PSE&G to securitize part of its stranded costs through the issuance of up to $2.525 billion in transition bonds, and to set a Transition Bond Charge to recover these costs from the ratepayers. The Order requires the TBC to be assessed against and "apply equally to each customer of [PSE&G], regardless of class, based on the amount of electricity delivered to the customer...through the transmission and distribution system of [PSE&G] or any successor electric public utility."

[25] *Infra* 13-15.

[26] While the principal focus below was on statutory construction and contract impairment issues, Co-Steel consistently raised the equal protection question in connection with that portion of the BPU's decision

due process and numerous other grounds. Those motions and appeals were all denied.[27]

Determining whether the actions of the BPU constitute an impairment of Co-Steel's contract with PSE&G requires an understanding of that contract and of the state action that will cause the Contract to be impaired. Likewise, determining whether the BPU's actions deprived Co-Steel and other intervenors of their right to a fair and impartial hearing requires an understanding of the procedural irregularities below.

A. Co-Steel and its Contract with PSE&G[28]

Co-Steel operates a steel 'minimill' at Perth Amboy, New Jersey. A steel mini-mill uses electric arc furnace technology to manufacture steel by melting scrap metal, rather than processing iron ore. The mill produces various grades of wire rod for a wide variety of uses. Wire rod is sold in highly competitive commodity markets wherein customer choices are largely driven by price and availability of product. The price of scrap and electricity account for two of the three most significant operating costs incurred by the Perth Amboy mill, the other being labor.

An electric arc furnace consumes large amounts of electricity. Co-Steel's load peaks at almost 100 megawatts and its annual energy consumption exceeds 440,000,000 kwh, which is about 1% of PSE&G's total energy sales.

Because of New Jersey's high energy costs relative to the jurisdictions in which Co-Steel's principal competitors were located, Co-Steel in 1994 was actively considering

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denying Co-Steel the full benefit of the statutory rate reduction. Brief of Appellant Co-Steel Raritan (N.J. S.Ct.) at 16 (August 21, 2000); Brief of Appellant Co-Steel Raritan (N.J. Sup. Ct., App. Div.) at 49 (December 10, 1999).

[27] App., *infra*, 94a, 14a, 1a-13a.

[28] *See generally*, App., *infra*, 32a-33a, 374a, *et seq.*

closing its Perth Amboy mill and relocating in another state, within the service territory of a lower cost utility. To foreclose that possibility and maintain Co-Steel as a customer, PSE&G offered to enter into a unique, special contract. As finally negotiated, the Contract provides that power supplied above 6 MW is non-firm; *i.e.*, interruptible by PSE&G on 30 minutes notice for up to 150 hours annually, and priced in two separate blocks. Block 1, applicable to the first 13 million kwh consumed each month (approximately one-third of Co-Steel's electric consumption), is billed under PSE&G's HTS tariff for transmission level service, but with a specialized fuel adjustment that differs from what was at the time PSE&G's standard fuel adjustment. Consumption in excess of 13 million kwh (Block 2) is billed under PSE&G's EHEP Tariff at the hourly marginal cost of energy, adjusted for losses, plus a fixed cost contribution, Gross Receipts and Franchise Tax set at 0.5295 cents per kwh, and the Remediation Adjustment Charge applicable to PSE&G's HTS tariff. For its part, Co-Steel agreed that PSE&G would be the sole source of electrical power for the Perth Amboy plant during the term of the agreement and that Co-Steel would invest at least $37 million in new capital in the Perth Amboy plant within the first four years. Because of the tax revenues and number of jobs at stake if Co-Steel were to leave its jurisdiction,[29] the State of New Jersey participated in the negotiations and, as an added inducement to the Contract, granted PSE&G special tax relief. The state attorney general approved the Contract, as did the BPU. As a result of this action, Co-Steel elected to remain in New Jersey, satisfied its capital investment

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[29] Co-Steel then employed more than 470 people at the Perth Amboy mill, representing a direct payroll of some $28 million and associated fringe benefits and payroll taxes approaching $11 million per year. In addition, Co-Steel annually pays local and State taxes on the order of $2 million and buys more than $50 million worth of goods and services from New Jersey vendors (exclusive of electricity).

obligations, and reduced its annual electric costs from over $24 million to about $18 million.

B. The Actions of the State that Impair the Contract

The stranded cost charges that the BPU ruled could be imposed upon Co-Steel impair the Contract in two fundamental ways. First, as noted above,[30] a stranded cost charge provides for the *current* recovery of a utilities' *previous* investment in facilities rendered uneconomic by virtue of the transition to a competitive regime. The Contract constitutes an agreement on the part of PSE&G to recover from Co-Steel less than the amount to which it would otherwise have been entitled to earn on its *previous* investment if service had been provided under one or more other tariffs. By imposing stranded cost charges upon Co-Steel, the state has increased the charges collected for the service PSE&G *currently* provides in order to generate revenue for *previous* investment that PSE&G, with previous BPU approval, had agreed to forego. Whether coincidentally or not, the amount of these charges (between $4.5 and $6.0 million annually), over the fifteen year term during which PSE&G is authorized to collect them, essentially equals or exceeds the aggregate $60 million cost reduction that Co-Steel obtained during the term of the Contract.

Second, the Contract anticipates and the parties clearly intended that at the end of its term Co-Steel would be free to choose whether to continue taking service from PSE&G under whatever terms and conditions might then apply or be negotiated or elect to take service from an alternative provider.[31] On its face, the Final Order appears to preserve that freedom, but that is illusory. If Co-Steel exercises its right to switch suppliers, the transition charges authorized by the BPU will allow PSE&G to

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[30] *Supra*, n. 2.

[31] *See* App., *infra*, 406a-409a.

collect from Co-Steel an amount in excess of $5 million per year for perhaps ten or more years beyond the Contract term. The practical effect of this is equivalent to an outright prohibition on switching: any switching of electric suppliers will be economically infeasible. Co-Steel thus will be tied to PSE&G for years after its current contract expires.

As the undisputed record evidence demonstrates,[12] these factors essentially negate the economic value of the Contract to Co-Steel. Under the guise of "stranded costs," PSE&G receives from Co-Steel increased revenues that, coincidentally or not, are essentially equal to the amount by which it had agreed to reduce its rates in the Contract. Co-Steel, on the other hand, having paid full consideration for what has now been taken away, will get the dubious privilege of being the only customer in the state obligated by contract to remain a customer of its utility after August 1, 1999, as well as the only customer in the state to which the full rate reduction of the Deregulation Act does not apply.

C. The Irregularities in the Conduct of the Administrative Proceeding

As the title of its application implies, the determination of the amount of PSE&G's stranded costs and the related stranded cost changes was an essential element of this proceeding. It is undisputed that the determination of that question involved the determination of adjudicative facts involving such things as the value of PSE&G's assets, and the BPU acted appropriately when it referred that issue, among others, to a state administrative law judge for an evidentiary hearing. The hearing, however, took place before the Deregulation Act passed and before PSE&G changed its restructuring proposal. Thus, the testimony submitted, the cross-examination conducted, and the briefs submitted by the

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[12] App., *infra*, 374, *et seq.*

parties addressed an application and a body of law that was soon to be radically altered.

Apart from this obvious problem, the Initial Decision of the ALJ failed, among other things, to fix the value of PSE&G's assets, as well as the amount of the utility's stranded costs. Nonetheless, the BPU did not remand for further hearings, did not conduct its own evidentiary hearings, and did not even conduct its own independent review of the evidence before the ALJ. Instead, it relied upon a consultant's report that was never made part of any evidentiary record.[11] Unlike the witnesses who testified on those issues before the ALJ, the qualifications, sources of information and opinions of the individuals who prepared this report were never subject to cross-examination. The parties who had participated in the evidentiary hearings that were supposed to determine this issue were given no opportunity to submit testimony or other evidence to either support or dispute the consultant's report. Indeed, only to the extent that they could have guessed it would be relied upon by the BPU could it be said that the parties had an opportunity to comment upon it. For apart from making it public, the BPU provided absolutely no notice that the report might be used to interpret, let alone supplant or modify, the record developed by the ALJ.

The BPU further compounded these problems by permitting PSE&G to materially amend its application after the hearing and denying the request of the Ratepayer Advocate and others to re-open the evidentiary record.

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[11] The BPU "released" the audit report that addressed unbundling and stranded cost matters -- the issues assigned to the ALJ -- on March 5, 1998. The only testimony from these auditors occurred in the course of the hearing conducted by the BPU on *restructuring* issues. App. *infra*., 26a.

D. The Failure of the BPU To Clearly Articulate its Decisions

Finally, the BPU failed to articulate any rational basis for a number of critical decisions. For example, the BPU's *entire* explanation for its multi-billion dollar decision regarding the value of PSG&E's stranded costs is this:

> [B]y letter dated November 18, 1998, the Auditors submitted to the Board a proposed quantification of the ALJ's stranded cost recommendations, reflecting a range of values based on three scenarios, from a low end of $2.485 billion, to a mid-range of $2.949 billion, to a high end of $3.320 billion. We **HEREBY ACCEPT** as reasonable, with one minor modification discussed below, the Auditor's mid-range quantification of the ALJ's decision with respect to PSE&G's net-of-tax owned generation stranded costs of $2.949 billion.[34]

Nowhere in its decision is there a single word as to why the selected value was accurate or likely to be more accurate than either of the two other estimates in the auditors' report or any of the evidence in the record of the evidentiary hearing. Even the conclusion that its decision was based on nothing more than a compromise is left entirely to inference.

The "minor modification" to which the passage above makes reference is a $9 million reduction in the auditor's mid-range estimate of stranded cost to reflect emission credits, an adjustment which the ALJ thought appropriate, but which he also did not quantify. The BPU's entire articulation of its rationale for this reduction is as follows:

> [T]he Auditors did not include any value for nitrogen oxide and sulfur dioxide emission credits, which adjustments the ALJ found appropriate. We

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[34] App., *infra*, 316a (emphasis in original).

> note that NJPII,[35] which recommended this adjustment, did not provide a quantification of these credits. While it is difficult to estimate the value of these credits with precision at this time, based on our judgment, we believe it fair to adjust the net-of-tax stranded cost amount of $2.949 billion to $2.94 billion to impute a value for these credits, consistent with the ALJ's findings.[36]

Once again, this example illustrates the lack of any articulated basis for its decision.

Indeed, one can search the entire record and find no list of the specific assets that PSE&G decided, after the close of the record, to transfer to an unregulated affiliate. Nowhere in the record is there real evidence of the 'market value' of those assets, despite the fact that the Deregulation Act specifically required the use of that standard.[37] The 'unusual' nature of the BPU's adherence to due process was acknowledged, but glossed over by the courts below.

E. Proceedings Below

Because the administrative proceedings below themselves constitute the basis for Co-Steel's appeals, they are described in the Statement, *infra*, at 2 - 7, and will not be repeated here. The BPU issued its Final Order on August 24, 1999.[38] Co-Steel filed a timely Motion for Reconsideration, which the BPU denied on October 19, 1999.[39]

Co-Steel and the New Jersey Business Users Association ('NJBU'), filed timely appeals with the New Jersey Superior

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[35] New Jersey Public Interest Intervenors.

[36] App., *infra*, 316a.

[37] N.J.S.A. 48:3-61(e)

[38] App., *infra*. 165a.

[39] App., *infra*, 94a.

Court.[40] Although the Ratepayer Advocate appeared as a Respondent,[41] the Ratepayer Advocate and NJBU both challenged the Final Order on grounds of procedural due process.[42]

In its decision, the superior court acknowledged that,

> [t]he administrative proceedings leading up to these decisions were unusual in many ways: hearings on the unbundling, stranded costs, and restructuring issues were held before an administrative law judge before the Act was passed; the securitization issue invited comments from interested parties but no hearings. Quasi-legislative public hearings were held on deregulation three years before the Act actually was introduced in the Legislature. The BPU's Final Decision relied heavily on a negotiated agreement between PSE&G and seven [out of 23] intervenors . . . .[43]

The court dismissed this 'unusual' procedure, saying:

> Despite the unusual procedural irregularities, however, we conclude that all parties had ample opportunity to be heard on all aspects of both decisions. We find no denial of due process and no fundamental unfairness.[44]

The court affirmed in all respects.

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[40] App., *infra*, 19a.

[41] App., *infra*, 29a.

[42] App., *infra*, 42a. Despite the fact that these issues were not raised by Co-Steel, they were pressed by others and passed upon below, and certiorari is therefore proper. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Virginia Backshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 (1991); *Stevens v. Dept. of Treasury*, 500 U.S. 1,8 (1991).

[43] App., *infra*, 20a.

[44] App., *infra*, 20a.

The Ratepayer Advocate filed with the New Jersey supreme court a petition for certification of the judgment, which the court granted on July 14, 2000.[45] Co-Steel filed an appeal as of right, which the supreme court treated as a petition for certification, which it granted, in part, on the same date.[46] The Court ordered the parties to file supplemental briefs on designated issues, including in connection with Co-Steel's appeal,[47] "the economic effect of the BPU's disposition of the enumerated issues and the economic impact that would result from the adoption of the position advocated by Co-Steel Raritan in respect of those issues...."

On December 6, 2000, one month after oral argument, the supreme court issued the following order:

> The Supreme Court having carefully considered the record, the briefs of the parties and *amici curiae*, and the argument of counsel,
>
> And the Court having determined that it is in the public interest to expedite the disposition of the within appeals;
>
> And good cause appearing:
>
> IT IS ORDERED that the judgment of the Appellate Division is affirmed. The opinions of the Court will be filed in due course.[48]

The order was served upon the parties accompanied by a letter from the clerk inviting them to "take whatever action is appropriate in light of the Court's ruling."[49]

No opinion has, as yet, been issued by the court.

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[45] App., *infra*, 13a.

[46] App., *infra*,11a.

[47] App., *infra*, 7a and 5a.

[48] App., *infra*, 1a.

[49] App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

Petitioner concedes that this case does not present a case in conflict with decisions of the courts below, nor a conflict among federal courts. It is, however, an important case and warrants review for the following reasons:[50]

First, the case presents issues, properly raised below, arising under the United States Constitution, involving substantial property interests of Co-Steel and others.[51] It raises a significant question as to whether, in resolving those issues, prior decisions of this Court have been properly interpreted and applied.[52] It raises the equally significant question as to whether the institutions of state government were here all too willing to sacrifice the inconvenient rights of Co-Steel and other ratepayers because they threatened to get in the way of a state initiative, involving billions of dollars,

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[50] *See Hill v. Colorado*, 530 U.S. 703, (2000)(granting certiorari because of the "importance of the case"). *See also Bush v. Gore*, No. 00-949, __U.S. __, 121 S.Ct. 525, 533 (2000), U.S. Lexis 8430 (U.S., December 12, 2000)("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.) ".

[51] *See Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 1007 (1992)(granting certiorari to review whether South Carolina's enactment of an act that effectively barred petitioner from building structures on his land and dramatically reduced its economic value accomplished a taking under the Fifth and Fourteenth Amendments requiring payment of just compensation).

[52] *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 432 (1981)(granting certiorari to determine the scope of Court's prior ruling); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965)(granting certiorari to determine whether rationale of previous decision should be carried over to Labor Management Relations Act); *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977)(granting certiorari to correct application of prior decision); and *Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977)(granting certiorari to determine retroactivity of prior decision).

backed by powerful, local institutions and interests.[53] This situation is likely to repeat itself throughout the country as state after state undertakes the deregulation of its utility industries. Moreover, it presents a decision below that is wrongly decided without an adequate and independent basis under state law to sustain the result.[54] Finally, petitioner is unable to obtain further state adjudication absent this Court's judicial intervention.[55]

THE DECISION BELOW IS ERRONEOUS

A. Because the final order essentially negates the economic value of the contract, the impairment of the contract is substantial and unconstitutional.

The BPU cited two provisions in the Contract that it claimed permitted the imposition of stranded cost charges. Neither can support that claim.

The first of these provides that if *PSE&G* "incurs any taxes, assessments of or other charges in connection with the services," provided under the agreement which were not applicable at the time of entering into the agreement, "such taxes, assessments or other charges shall be passed through to

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[53] *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 542 (1974)(granting certiorari to resolve important question regarding administration of a state prison); *Rhodes v. Chapman*, 452 U.S. 337, 344 (1981)(same); *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982)(granting certiorari to resolve an important question concerning the administration of state institutions for the mentally retarded).

[54] *See Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98, *reh. denied*, 303 U.S. 667 (1938)(noting that where a state court does not decide a case upon an independent state ground, but deeming a federal question to be before it, actually entertains and decides the question adversely to the federal right asserted, the Supreme Court has jurisdiction to review the judgment, if final).

[55] *Lucas*, 505 U.S. at 1012 [observing petitioner "would plainly be unable (absent our intervention now) to obtain further state-court adjudication . . . ."].

[Co-Steel] Raritan *as an increase in PSE&G's costs of providing service* hereunder."[56] The stranded cost charges here at issue are not, however, *increased costs incurred by PSE&G* after entering the agreement at all; they are, rather, accelerated revenues that PSE&G has been authorized to collect for investments made *before* entering into the agreement. Unlike the kind of 'increase in PSE&G's costs' contemplated by this provision in the Contract, the moneys collected from Co-Steel as 'stranded costs' are not paid by PSE&G to a third party, they are pocketed by PSE&G for the benefit of its shareholders.

The other language upon which the BPU relied was a provision that made the Contract "subject to present and future local, state and federal laws and to the regulations or orders of any local, state or federal regulatory authority having jurisdiction over the matters set forth herein."[57] This language does nothing more than acknowledge the state legislature's inalienable authority to regulate utility services and charges. As this Court noted long ago,

> the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant; and . . . all contract and property [or other vested] rights are held subject to its fair exercise.[58]

The Contract, therefore, could just as well have been silent on the subject. The state's authority to subsequently modify the Contract would not have been affected in the least. But that does not mean that the state's exercise of that power is unlimited. As the quotation above makes clear, the exercise

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[56] App., *infra*, 427a (emphasis added).

[57] App. *infra*, 429a.

[58] *Atlantic Coast Line R.R. Co. v. Goldsboro*, 232 U.S. 548, 558 (1914).

of that power must be reasonable. Whether it acts pursuant to its sovereign power or under this clause of the Contract, the state cannot do whatever it chooses. It cannot take property without just compensation and it cannot so diminish the value of a contract as to impair it. Were it otherwise, there could never be a case in which a state public utility authority could be found to have unconstitutionally impaired a contract. Yet such cases do exist.[59]

In a further attempt to justify its decision, the BPU asserted that the Contract cannot have been impaired because "Co-Steel will be receiving power at a net price lower than that originally bargained for . . . ."[60] That is, of course, irrelevant if the legislature intended an even greater increase, but it is also wrong. It ignores the undisputed testimony of the Co-Steel witnesses who testified, without contradiction, on the negative financial impact of the stranded cost charges on Co-Steel as well as a rate increase that occurred after April 30, 1997, the date on which the Deregulation Act's mandated reductions are to be based.[61]

As the Contract itself and record evidence demonstrates, price was a crucial element in the Contract, and it is untenable

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[59] *See*, e.g., *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442 (8th Cir. 1984); *Bunker Hill Co. v. Washington Water Power Co.*, 561 P.2d 391 (Idaho 1977); *Agricultural Products Corp. v. Utah Power & Light Co.*, 557 P.2d 617 (Idaho 1976).

[60] App., *infra*, 334a.

[61] On April 1, 1998, the BPU approved an increase in PSE&G's demand-side management charges. *In re Public Service Electric & Gas Co.*, BPU Docket No. ER97020101 (April 1, 1998). This resulted in a 3.9% increase in rates for the average PSE&G customer, who, therefore, is better off after the Act's rate reductions. But for Co-Steel, the increase resulting from this decision was over 9%, or $1.8 million. Neither a 5% nor 10% reduction on only one-third of Co-Steel's load cannot yield savings greater than a 9% increase applied to its total load.

to suggest that unexpectedly tacking on 'stranded cost' surcharges in an amount equal to the rate reduction for which Co-Steel bargained and gave substantial consideration does not constitute a substantial contract impairment. The price provisions in the Contract were integral to its execution, to the retention of Co-Steel as a customer in New Jersey, and Co-Steel's increasing its investment in the State. Co-Steel would never have signed the Contract if these stranded cost charges had been included.[62] And if Co-Steel would not have signed the Contract with these charges in it, it is patently absurd to suggest that the Contract is not impaired when these charges are added to the Contract after Co-Steel signed it.

Like the BPU, the superior court both ignored the administrative record and substituted its views for the uncontradicted evidence in the record. On several key points relating to whether any contract impairment occurred, the court drew unwarranted and incorrect inferences from facts in the record that were undisputed.

In affirming every aspect of the BPU's decisions, the courts below gave, and acknowledged they were giving, deference to the BPU's. But no such deference is required in connection with an agency's interpretation of case law or legal conclusions[63] and none is warranted when the decision conflicts with express or implied legislative intent[64] or to interpretations not dependent on the BPU's special expertise.[65]

No one would question that, absent the stranded cost provisions of the Deregulation Act or the BPU's decision, PSE&G would not be at liberty unilaterally to impose a post-

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[62] App., *infra*, 409a.

[63] *E.g., Mayflower Security Co. v. Bureau of Securities*, 64 N.J. 85, 93 (1973).

[64] *E.g., P.F. ex rel. B.F. v. New Jersey Div. Of Dev. Disabilities*, 139 N.J. 522, 529 (1995).

[65] *E.g., Close v. Kordulak Bros.*, 44 N.J., 589, 599 (1965).

contract surcharge on Co-Steel. It is axiomatic that a seller signing a contract at a set price may not, after the Contract ends, collect a surcharge to cover additional costs incurred before or during the Contract. The action of the state allows PSE&G to do what it could not otherwise have done: impose a post-contract surcharge without the consent of the other party.

In *Allied Structural Steel Co. v. Spannaus*, the Court wrote:

> [the] severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.[66]

It is hard to imagine a greater impairment than one that negates the economic value of a contract. Yet electric industry deregulation could just as effectively been carried out *without* impairing the Contract; a factor that is particularly significant given the fact that the New Jersey Attorney General approved the contract before it was approved by the BPU.[67] Since the Deregulation Act substantially and needlessly impairs the Contract, the state action here violates the contract impairment clause.

B. If the BPU is correct that the Deregulation Act requires the assessment of stranded costs, then excluding Co-Steel from the full rate reductions mandated by the Act deprives Co-Steel the equal protection of the law.

Co-Steel did not assert any right to the rate reduction mandated by the Act until after the BPU ruled that the Act

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[66] 438 U.S. at 245 (footnote omitted).

[67] *See Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3rd Cir. 1987), *citing United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25-26 and 30-32 (1977).

required the assessment of stranded cost charges despite the Contract, but that the Contract precluded Co-Steel from receiving the full rate reduction mandated by the Act. If the BPU is correct that the Deregulation Act requires the assessment of stranded costs, then excluding Co-Steel from the full rate reduction mandated by the Act deprives Co-Steel the equal protection of the law.

Section 4(d)(1) of the Deregulation Act states in clear, unequivocal terms that:

> During a term to be fixed by the board, each public utility shall reduce its aggregate level of rates *for each customer class*, including any surcharges assessed pursuant to this act, by a percentage to be approved by the board, which shall be at least 10 percent relative to the aggregate level of bundled rates in effect as of April 30, 1997, subject to the provisions of Paragraph (2) of this subsection.

(Emphasis added). There is no room in this language for interpretation or assumptions about its meaning or the exercise of administrative discretion.[68] Yet, in deciding that the provision did not apply to Co-Steel's Block 2 purchases, the BPU opined that it was "much more reasonable" to assume "customer class" referred only to customers served under fixed tariffs. The BPU did not explain why the legislature might have concluded that there were customers who were not part of a "customer class" or why the EHEP tariff was legally any less of a "fixed tariff" than all of the others.

By applying its own view of what was reasonable, the BPU not only deviated from the express language of the Deregulation Act and the well understood meaning of the

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[68] *See*, e.g., *B.F., ex rel*, 139 N.J. at 529 (1995).

term within the industry,[69] it created two classes of New Jersey ratepayers: those who take service under a fixed tariff;

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[69] The Deregulation Act itself nowhere defines the term "customer class," but it is a term long-established and well-understood in utility ratemaking. Co-Steel takes its contract service under PSE&G's EHEP tariff, which appears as Sheet No. 85 in PSE&G's published tariffs. The customers taking under the EHEP tariff constitute a separate customer class as that term is normally understood (and if Co-Steel currently is the only such customer, then it is a class by itself). The BPU's regulations do not directly define "customer class," but N.J.A.C. 14:4-2.4, which requires an applicant for an electric power supplier license to specify the number of customers and sales volume "by customer class," contains two separate references to "customer class" and each is immediately followed by the parenthetical "(i.e. utility specific rate schedule)." This confirms that all customers are, and all consumption occurs, as part of a class. The EHEP tariff is a utility specific rate schedule and EHEP customers are a class.

Indeed, the FERC Form 1 which PSE&G was required for file for the year ended December 31, 1998, lists, on page 304.1, PSE&G's various rate schedules in effect during the year and the number of customers, kilowatt-hours, etc., for each. The EHEP tariff is listed there as one of the schedules and is shown to be applicable to just one customer who consumed during the year 482,805,000 kwh — the sum of Co-Steel's Block 1 and 2 usage. This too shows that PSE&G normally considers Co-Steel, and all its consumption, to constitute a separate customer class.

The meaning of the term "customer class" as including *all* utility customers is so widely understood and accepted that research reveals few decided cases expressly addressing the issue. However, customers taking service under a special contract rate schedule routinely are deemed by utility regulators in other jurisdictions to comprise a customer class unto themselves. *See, e.g., Central Illinois Light Co.*, 1999 Ill. PUC Lexis 649 (Aug. 25, 1999) (Rate 32 Contract Service listed as a customer class); *Entergy Louisiana*, 1999 La. PUC LEXIS 42 (May 26, 1999) (Special Contract Rate Customers are a customer class); *Detroit Edison Co.*, 1998 Mich. PSC LEXIS 355 (Dec. 28, 1998) (special contract customers one of Detroit Edison's customer classes); *Laclede Gas Co.'s PGA Rate Design*, 1995 Mo. PSC LEXIS 30 (Aug. 22, 1995) (special contract customers are a class).

to whom Section 4(d)(1) is then deemed to apply, and those who take service under non- fixed tariffs, to whom the BPU determined it does not. Conveniently, Co-Steel not only falls — but is the *only* customer in the entire State of New Jersey that falls — into the latter class, a class of one.

The fact that it was the BPU and not the legislature that drew this distinction is significant. For "[l]egislatures are presumed to have acted constitutionally."[70] In extending unwarranted deference to the BPU's interpretation of the statute, the courts below turned this presumption on its head and needlessly created a constitutional issue that could and should have been resolved solely on the basis of the statute.

The BPU's sole attempt to provide a rational basis for the distinction it drew between Co-Steel's tariff and those applicable to everybody else was based upon the fact that Co-Steel's Block 2 purchases are based on market prices. This is true. But that does not mean that the statutory rate reduction should not apply. Once again, if any assumption is justified, it is the assumption that the legislature was aware of all of the PSE&G's published tariffs. And, if any inference is justified, it is that by not excluding the EHEP tariff from Section 4(d), the legislature meant it to be included. There is simply no authority, other than the BPU's preference, for the result to be otherwise.

The position the BPU takes in the Final Order is untenable, for it leaves Co-Steel's Block 2 consumption as not part of *any* customer class — apparently just floating classlessly in no-man's-land. That cannot be correct. For purposes of section 4(d) of the Deregulation Act, Co-Steel properly must be viewed as part of the EHEP customer class, its total consumption under that tariff must be deemed the consumption of that class, and the statutory percentage rate reductions must be applied to the total consumption of that

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[70] *McDonald v. Board of Election Comm'rs.*, 394 U.S. 802, 809 (1969).

class, as the language of the Deregulation Act requires. Any other conclusion would single out Co-Steel, alone among all customer classes, and arbitrarily deny it without rational reason the same level of benefits accorded all other classes, resulting in a denial to Co-Steel of the equal protection of the laws.[71]

C. The "unusual procedural irregularities" of the BPU deprived all parties of due process.

What due process of law is required, depends, of course, upon the circumstances. However, this much is clear, "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[72] Furthermore, "the decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing . . . [and] . . . [t]o demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on . . . ."[73] Finally, an agency's failure to articulate its rationale cannot be saved by *post hoc* rationalization.[74]

Petitioner recognizes the need to implement restructuring on a timley basis. After the passage of the Deregulation Act, however, the BPU and the courts of New Jersey clearly got swept away in the perceived urgency utility restructuring and foresook legality and utility restoring in the interest of expediency in a manner that violates every notion of fundamental fairness.

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[71] *See, e.g., Smith v. Cahoon*, 283 U.S. 553 (1931); *F.S. Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920).

[72] *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

[73] 397 U.S. at 271. *See also Atchison, Topeka & Santa Fe Rwy Co. v. Wichita Board of Trade*, 412 U.S. 800, 805-6 (1973).

[74] *E.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 50 (1983); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

CONCLUSION

The petition for a writ of certiorari should be granted.

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